Supreme Court, U.S.
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No. 06-842

In the Supreme Court of the United States

NIZAR MOMIN, also known as Nick Momin,
Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

KEVIN A. VOTH
MILLS & WILLIAMS, LLP
5910 N. CENTRAL EXPRESSWAY
SUITE 900
DALLAS, TX 75206-5141
(214) 265-9265
(214) 363-3167 fax

ADAM L. SEIDEL
(Counsel of Record)
ADAM L. SEIDEL, P.C.
PREMIER PLACE, SUITE 900
5910 N. CENTRAL EXPRESSWAY
DALLAS, TX 75206
(214) 528-3344
(214) 528-3377 fax

Counsel for Petitioner
Nizar Momin

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

I. Is Petitioner's appeal challenging his sentence on the basis of arithmetic error reviewable under terms of Petitioner's plea agreement?

II. Did the District Court clearly err by failing to consider the value of collateralized property in determining loss and restitution amounts, resulting in an arithmetic error at sentencing?

PARTIES TO THE PROCEEDINGS IN THE COURTS BELOW

1. Nizar Momin, a.k.a. Nick Momin

2. United States of America

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Petitioner, Nizar Momin, respectfully requests this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on July 11, 2006, because the Court of Appeals has incorrectly decided an important federal question in a way that should be settled by this Court. Petitioner submits that the Fifth Circuit Court of Appeals order dismissing Petitioner's appeal should be reversed, and the case remanded to the Fifth Circuit to review the merits of Petitioner's direct appeal.

OPINIONS OF THE COURTS BELOW

The Fifth Circuit issued an order without opinion granting the Government's motion to dismiss Petitioner's appeal from his sentence, in United States v. Momin, No. 05-11200 (5th Cir. Jul. 11, 2006).

JURISDICTIONAL STATEMENT

Pursuant to 28 U.S.C. § 1254, cases in the United States Courts of Appeals may be reviewed by the Supreme Court by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree. On July 11, 2006, the United States Court of Appeals for the Fifth Circuit entered final judgment in United States v. Momin, No. 05-11200 (5th Cir. 2006), issuing an order dismissing Petitioner's appeal without opinion. Petitioner invokes this Court's jurisdiction because the Court of Appeals has incorrectly decided important federal questions in granting the Government's motion to dismiss Petitioned's direct appeal.

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291.

Section 3742(a) provides: "A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence--

> (1) was imposed in violation of law;
>
> (2) was imposed as a result of an incorrect application of the sentencing guidelines; or
>
> (3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or
>
> (4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable."

Section 1291 provides: "The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals

for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title."

STATEMENT OF THE CASE

A. Preliminary Statement

Petitioner Momin was charged with one count of conspiracy to commit bank fraud in violation of 18 U.S.C. §§ 371 and 1344(2), and one count of bank fraud, in violation of 18 U.S.C. § 1344(2). On January 27, 2005, Petitioner appeared before the district court judge and entered a plea of guilty to the conspiracy count. (CR:8-15). The remaining bank fraud count was dismissed pursuant to Petitioner's plea agreement with the Government. (CR:164-69). The plea agreement also contained a waiver of appeal provision, except in certain cases including, *inter alia*, **arithmetic sentencing errors**. The district judge accepted Petitioner's guilty plea and scheduled a sentencing date.

On October 15, 2005, a sentencing hearing was held and witness testimony was heard. The district court judge sentenced Petitioner to fifteen (15) months confinement, and further ordered him to pay $2,928,874 in restitution. (CR:104-9).

Petitioner appealed his sentence to the Fifth Circuit Court of Appeals on the ground that the district judge committed arithmetic error in calculating the applicable Guidelines range. The Government subsequently filed a motion to dismiss Petitioner's appeal based upon the plea agreement's waiver provision. The Fifth Circuit granted the Government's motion and dismissed the appeal without addressing the merits of the appeal.

B. Statement of Facts

The record shows that Petitioner Momin, an operator of convenience stores, participated in a scheme to fraudulently obtain guaranteed loans from the Small Business Administration (SBA). Specifically, Petitioner made false representations with respect to the loan applications. Petitioner entered into a plea agreement under which he reserved the right to appeal the following: (a) any punishment imposed in excess of the statutory maximum; (b) any upward departure from the guidelines range deemed most applicable by the sentencing court; (c) arithmetic errors in the guidelines calculations; and (d) a claim of ineffective assistance of counsel that affects the validity of the waiver itself.

During the sentencing hearing, the Government's lead investigator, Agent Gaylor, testified that Petitioner was, in fact, in the business of operating convenience stores and that he had actually operated the convenience stores once the loan transactions had been completed. The testimony further revealed that while Petitioner operated the stores, he expended considerable sums of money in an effort to keep the stores afloat. In particular, other codefendants repeatedly raided Petitioner's inventory and extorted money from him in excess of $20,000. The situation ultimately ruined Petitioner financially. Yet in spite of this harassment, Petitioner continued for some time to make a bona fide attempt to keep the stores in operation. The Government introduced no evidence to the contrary.

The Presentence Report (PSR) concluded that the actual loss amount for the loans in question totaled $2,928,874.00, and applied that same amount as restitution. (PSR:4). Applying the 1998 Sentencing Guidelines, Petitioner's Base Offense Level was 6. U.S.S.G. § 2F1.1(a). An additional 13

levels were added based on an intended loss amount greater than $2,500,000, but less than $5,000,000. U.S.S.G. § 2F1.1(b)(1)(N).

Petitioner objected at sentencing, asserting that the calculation of the loss amount was arithmetically flawed. The district court's loss calculation failed to deduct the value of the collateralized property, *viz.* the legitimate businesses Petitioner owned and operated using the SBA loans.

The record reflects that the district court judge accepted the intended loss amount as designated in the PSR. The district court judge granted the Government's motion for a four-level downward departure, and, looking to the Guidelines, applied a sentencing range of 15 to 21 months. The record also shows that the district judge accepted the PSR's actual loss amount, and ordered restitution in the amount of $2,928,874.

Citing the "arithmetic error" exception contained in the plea agreement, Petitioner appealed his sentence to the Fifth Circuit, raising the argument that the district court judge erred in calculation of the loss amount, which resulted in a miscalculation of the applicable guidelines range. The Government filed a motion to dismiss Petitioner's appeal on the ground that it was barred by the waiver of appeal provision in the plea agreement. The Fifth Circuit granted the motion and dismissed the appeal without opinion.

SUMMARY OF ARGUMENT

The Fifth Circuit clearly erred when it granted the Government's motion to dismiss Petitioner's appeal. Under the plain language of the plea agreement with the Government, Petitioner expressly reserved the right to appeal his sentence if based upon an "arithmetic error." The district court judge committed such error by miscalculating the Guidelines range. The sentence given was arithmetically flawed because the district judge applied a loss amounts that, contrary to law, failed to subtract the value of collateralized property obtained with the subject loans. The district court judge's miscalculation constituted an arithmetic error in which the district judge followed a Guidelines calculation contrary to the evidence and law. Accordingly, Petitioner was within his right to appeal his sentence. The Fifth Circuit's order dismissing Petitioner's appeal without addressing the merits on review constitutes reversible error.

Although the district court judge indicated that application of the Guidelines was advisory, he clearly applied the applicable Guidelines in determining Petitioner's sentence, and did so using a clearly erroneous loss amount. Under both the Guidelines and relevant case law, the actual loss amount is the amount of the loan not repaid at the time the offense is discovered, reduced by the value of pledged assets the lender can expect to recover. Here, the record shows that the value of Petitioner's pledged assets was never deducted from the actual loss amount. Petitioner was clearly harmed by the district court's miscalculation in sentencing. Petitioner has advanced a meritorious issue on direct appeal.

Because of the ubiquity of the "arithmetic error" exception to waiver-of-appeal terms in plea agreements, a clear and uniform understanding of the scope of the exception

is needed. Additionally, the Petitioner's substantive claim of error regarding the application of collateral to the calculation of loss is one that should be examined by a reviewing court. Thus, the issues in this case present important and substantial questions that should be answered by this Court.

REASONS FOR GRANTING THE WRIT

The right to appeal is one created by statute; it is not a constitutional right. Abney v. United States, 431 U.S. 651, 656 (1977); 18 U.S.C. § 3742; 28 U.S.C. § 1291. As a defendant may waive constitutional rights, it follows that he may also waive statutory ones. United States v. Melancon, 972 F.2d 566, 567 (5th Cir. 1992) (citing Town of Newton v. Rumery, 480 U.S. 386, 393 (1987)). Nevertheless, a waiver of appellate rights does not deprive a reviewing court of jurisdiction. United State v. Story, 439 F.3d 226, 231 (5th Cir. 2006).

I. THE FIFTH CIRCUIT CLEARLY ERRED IN DISMISSING PETITIONER'S APPEAL BECAUSE THAT RIGHT WAS EXPRESSLY RESERVED UNDER THE TERMS OF THE GOVERNMENT'S PLEA AGREEMENT.

To determine whether an appeal of a sentence is barred by an appeal waiver provision in a plea agreement, the court conducts a two-step inquiry: (1) whether the waiver was knowing and voluntary and (2) whether the waiver applies to the circumstances at hand, based on the plain language of the agreement. United States v. Bond, 414 F.3d 542, 544 (5th Cir. 2005). A reviewing court applies general principles of contract law in order to interpret the terms of a plea agreement. E.g. United States v. Cantu, 185 F.3d 298, 304 (5th Cir. 1999); United States v. Hamdi, 432 F.3d 115, 122

(2d Cir. 2005). A waiver-of-appeal provision is to be construed against the Government as the drafter. United States v. Harris, 434 F.3d 767, 770 (5th Cir. 2005) (refusing to broadly read the waiver of appeal); United States v. Somner, 127 F.3d 405, 408 (5th Cir. 1997) (exception to waiver provision cannot be read restrictively). "Because the government ordinarily has certain awesome advantages in bargaining power, any ambiguities in the agreement must be resolved in favor of the defendant." United States v. Lenoci, 377 F.3d 246, 258 (2d Cir. 2004).

Petitioner entered into a plea agreement under which he reserved the right to appeal the following: (a) any punishment imposed in excess of the statutory maximum; (b) any upward departure from the guidelines range deemed most applicable by the sentencing court; (c) *arithmetic errors in the guidelines calculations*; and (d) a claim of ineffective assistance of counsel that affects the validity of the waiver itself. (Emphasis added). Petitioner does not contend that the waiver was not knowing and voluntary. Rather, Petitioner asserted below that the error falls under the plain language of the agreement, *viz.* "arithmetic error in Guidelines calculation." Even if that term is considered ambiguous in its application, it must be construed broadly in favor of Petitioner. Accordingly, Petitioner's right to appeal with respect to the district court's error in Guidelines calculation was not waived and the merits of Petitioner's appeal should have been addressed below.

A. The Waiver Of Appeal Cannot Encompass Arithmetic Error In Calculating Loss Amount Because It Undermines The Factual Basis Of The Plea.

In other cases involving waiver of appeal rights, the courts have reconciled such waivers with appellate review where manifest injustice warrants it, allowing in some circumstances, an appeal notwithstanding a waiver. For example, it is well settled that the "entry of a guilty plea does not act as a waiver of jurisdictional defects such as an indictment's failure to charge an offense" and that a defendant may raise such failure at any time. United States v. Meacham, 626 F.2d 503, 510 (5th Cir. 1980); United States v. Berrios-Centeno, 250 F.3d 294, 2001 WL 435494 (5th Cir. 2001). Moreover, this Court has held that, notwithstanding an unconditional plea of guilty, reversal on direct appeal is warranted where the factual basis for the plea fails to establish an element of the offense of conviction. See, e.g., United States v. Johnson, 194 F.3d 657 (5th Cir. 1999), vacated and remanded, 120 S. Ct. 2193 (2000), prior opinion reinstated with modification, 246 F.3d 749 (5th Cir. 2001). The considerations militating against waiver are forceful where a claimed defect in an indictment affirmatively reflects that the offense sought to be charged was not committed. See White v. United States, 258 F.3d 374, 380 (5th Cir. 2001) ("notwithstanding an unconditional plea of guilty, we will reverse on direct appeal where the factual basis for the plea as shown of record fails to establish an element of the offense of conviction.") In White, the Fifth Circuit itself rejected the government's waiver argument, holding that failure to do so created the unacceptable risks of depriving a person of his liberty for conduct that does not constitute an offense. Id. at 215. Meanwhile, in United States v. Spruill, 292 F.3d 207 (5th Cir. 2002), the defendant pled guilty and waived his

right to appeal, except for constitutional issues raised pretrial. Id. at 215. The reservation of appellate rights did not expressly reserve the right to appeal whether the defendant's conduct, admitted in his factual resume, actually constituted an offense under the applicable statute. Id. The Fifth Circuit nevertheless addressed the merits of the defendant's direct appeal and ultimately vacated the conviction. Id. at 221. The Fifth Circuit citing White, stated that a similar appeal waiver was "insufficient to accomplish an intelligent waiver of the right not to prosecuted (and imprisoned) for conduct that does not violate the law." Id. at 215.

In the instant appeal, the district court judge's determination of loss amount for purposes of sentencing, if indeed erroneous, was equivalent to Petitioner being imprisoned for conduct that does not violate the law. Petitioner attempted to assert on direct appeal that arithmetic errors occurred at sentencing where the district court judge applied an intended loss amount which clearly omitted the value of the collateralized property. Thus, the waiver-of-appeal provision should not be construed to encompass the type of error committed by the district court judge.

B. The Government's Motion To Dismiss Petitioner's Appeal Was Unsupported By Relevant Authority.

In its motion to dismiss Petitioner's appeal, the Government relied exclusively upon United States v. Cuevas-Andrade, 232 F.3d 440 (5th Cir. 2000) to support its argument that an error in calculating loss amount does not constitute arithmetic error in Guidelines calculation. However, that case is distinguishable. In Cuevas-Andrade, the appellant challenged the direct applicability of the specific Guideline at issue. Id. at 446. The district court had enhanced appellant's sentence on the basis of a factual finding

that appellant had a prior drug trafficking conviction involving the use of a firearm. Id. Nevertheless, the appellant argued that the district court erred in classifying that prior conviction as a "crime of violence," making the Guideline enhancement inapplicable. Id. at 446. On appeal, the Fifth Circuit determined that the error alleged did not fall under any of the appellate categories that were not waived, including arithmetic error. Id. In the instant appeal, the issue below was not whether the Guidelines applied. Rather, Petitioner asserted that the district court judge committed an arithmetic error by failing to subtract the value of the collateral from the loss amount. This arithmetic error was the direct cause of sentencing error where the record clearly shows the district court judge applied the Guidelines. This type of error is plainly arithmetic in nature. Looking at the plain language of the agreement, Petitioner reserved the right to challenge such arithmetic errors. The Fifth Circuit's decision to grant the Government's motion to dismiss was clearly erroneous and should be reversed.

II. THE DISTRICT COURT CLEARLY ERRED IN DETERMINING THE VICTIM LOSS AMOUNT BECAUSE IT FAILED TO SUBTRACT THE VALUE OF COLLATERALIZED PROPERTY, RESULTING IN ARITHMETIC ERROR AT SENTENCING.

A determination of loss amount for purposes of sentencing is a factual finding, reviewed for clear error. United States v. Sanders, 343 F.3d 511, 520 (5th Cir. 2003); United States v. Tedder, 81 F.3d 549, 550 (5th Cir. 1996). Thus, it must be shown that the finding is plausible in light of the record as a whole. Sanders, 343 F.3d at 520. While this is a deferential standard, "it is more than a rubber stamp." Id. at 528. Here, the Presentence Report ("PSR") used an incorrect loss amount to as the basis for its Guidelines calculation,

contrary to the evidence and law. The District Court's reliance on the PSR was clearly erroneous and harmful to Petitioner.

A. The Actual Loss Amount Should Have Been Reduced By The Value Of The Collateral Which Secured The Loan.

Where a defendant intended to repay the loan, the "actual loss" amount is used as the basis for the Guidelines calculation rather than the "intended loss". Id. at 527; United States v. Morrow, 177 F.3d 272, 301 (5th Cir. 1999); Tedder, 81 F.3d at 551. The government bears the burden of proving by a preponderance of the evidence that the defendant did not intend to repay the loan. Sanders, 343 F.3d at 527. Therefore, in the absence of facts establishing an intent not to repay the loans, the actual loss must be used to calculate the offense level. Id. The "actual loss" is the amount of the loan not repaid at the time the offense is discovered, *reduced by the amount the lending institution can expect to recover from assets pledged to secure the loan.* U.S.S.G. § 2F1.1, comment. n. 7(b). The Government conceded that if the loan is collateralized, the value of the collateral must be deducted from the actual loss amount.[1] See, e.g., Tedder, 81 F.3d at 551.

1. Uncontroverted evidence supports the conclusion that Petitioner did not intend a loss in the full amount of the loans.

In the case at bar, the Government introduced no facts that indicated an intent not to repay the loan. By contrast,

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[1] See Addendum to the Presentence Report, p. 2.

Petitioner adduced evidence at sentencing supporting the conclusion that he did not intend a loss in the full amount of the loan. Accordingly, the actual loss amount is the proper measure for an offense level calculation. See Sanders, 343 F.3d at 527.

During the sentencing hearing, the Government's lead investigator, Agent Gaylor, testified that Petitioner was, in fact, in the business of operating convenience stores and that he had actually operated the convenience stores once the loan transactions had been completed. The testimony further revealed that while Petitioner operated the stores, he expended considerable sums of money in an effort to keep the stores afloat. Specifically, several codefendants repeatedly raided Petitioner's inventory and extorted money from him in excess of $20,000. Despite of this harassment, Petitioner continued to make a bona fide attempt to keep the stores in operation. The Government introduced no evidence to the contrary.

This case bears similarities to the situation found in Sanders. In Sanders, the Fifth Circuit held that the district court erred in failing to consider certain key facts pertaining to the defendant's intent to repay the loan. 343 F.3d at 525. In particular, the Fifth Circuit cited (1) the defendant's actual operation of the business, (2) his expenditure of time and money into the business, and (3) that the loan was secured by collateral, as evidence of the intent to repay the loan. Id. Similarly here, Petitioner actually operated the convenience stores which were the subject of the SBA loans. Indeed, Petitioner made good faith attempts to keep the stores in operation in spite of the codefendants' actions. To that end, Petitioner made significant personal expenditures in order to stay in business. That Petitioner failed in his endeavor cannot, without more evidence, demonstrate an intent not to repay the

loan. See id. at 527. Moreover, Petitioner's financial situation worsened from the time he obtained the loan. As in Sanders, because Petitioner had a greater ability to pay when the loan application was made, he was therefore *less* likely not to repay the loan at that time. See id. at 526. The Government completely failed to show otherwise. See id. at 527.

2. Petitioner excercised control over the collateral used to secure the loan.

"If the defendant has no ownership interest in *or control over the collateral used to secure the loan*, then the loss calculation amount does not need to consider the value of the collateral." Sanders, 343 F.3d at 526 (emphasis supplied). Case-law demonstrates that *control* is the critical factor in determining whether collateral or repayments should be considered. In both Tedder and Morrow, the court held that use of the full intended loss amount was not clearly erroneous because there was no evidence that the defendant had any *control* over the repayments. Morrow, 177 F.3d at 300; Tedder, 81 F.3d at 551.

In this case, uncontroverted evidence established that Petitioner indeed exercised control over the collateral securing the loans - real property in the form of convenience stores and their inventories. Accordingly, the value of the collateral should have been subtracted from the actual loss amount. See also United States v. Nichols, 229 F.3d 975, 980 (10th Cir. 2000) ("it is error to ignore the contemporaneous exchange of security for the note in considering the economic reality of the transaction . . .").

The PSR cited the applicable rule from Sanders, but ignored its plain language, *viz.* the italicized portion quoted

above regarding *control* over the collateral. The PSR simply stated that because of Petitioner's poor credit rating and finances, the loans were not made in his name.[2] The Government argued that because the loans were not in Petitioner's name, "he had little, if any, legal holdings over the collateral."[3] This is simply an erroneous application of law. Indeed, if the Government's assertion is to be accepted, then *every* false loan application would result in an intended loss of the full amount. See Nichols, 229 F.3d at 980. For example, in Nichols, it was uncontested that the defendant used a false name and social security number in his loan application, and that the loan would not have been made but for the false information. Id. However, the Tenth Circuit held that while such facts were indicative of an intent to deceive, it did not mean there was an intent to deprive the lender of the value of the collateral. Id.

3. Petitioner made no attempt to conceal the convenience stores or otherwise deprive the lender of their value.

The security of a loan is a valid consideration in determining loss, unless the record indicates the defendant "intended to permanently deprive the lender of security by concealing pledged collateral." United States v. Williams, 292 F.3d 681, 686 (10th Cir. 2002); United States v. Banta, 127 F.3d 982, 984 (10th Cir. 1997). Here, the Government neither alleged nor adduced any evidence indicating Petitioner attempted to conceal the collateral pledged to secure the loan. Indeed, as Petitioner pointed out to the district court, the

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[2] See Addendum to the Presentence Report, pp. 1-2.

[3] See Addendum to the Presentence Report, p. 2.

relevant collateral was in the form of real property.[4] Unlike vehicles and other personal property, the convenience stores could not be moved around or otherwise "concealed." There was a resale market for the properties which were easily located and foreclosed upon. See Nichols, 229 F.3d at 980-81 (collateral value should have been deducted where lender could easily repossess property–a house and automobile); Williams, 292 F.3d at 686-87 (collateral, a car, properly excluded where vehicle was unlawfully possessed and transported from Utah to Hawaii); Banta, 127 F.3d at 984 (collateral value excluded where defendant's false statements made locating collateral "quite difficult"). The fact that false representations were made to obtain loans was not, without more, proof of an intent to deprive the lender of the collateral's value. Nichols, 229 F.3d at 980; Williams, 292 F.3d at 687.

CONCLUSION

The Fifth Circuit clearly erred in granting the Government's motion to dismiss Petitioner's direct appeal, and in failing to address the merits of the appeal. In so doing, the Court below ignored the plain language of the plea agreement, which reserved Petitioner's right to appeal an arithmetic error at sentencing. Even if considered ambiguous, the issue should be resolved in favor of Petitioner, and the merits should be addressed. When the grounds for appeal are considered, it becomes clear that the district court committed reversible error in sentencing. Considering how common this particular waiver-of-appeal provision is in federal plea agreements, resolution of this issue clearly suffices as a substantial question worthy of this

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[4] See Defendant's Objections To Presentence Report, pp. 2-3.

Court's consideration. Accordingly, Petitioner respectfully requests that this Petition for a Writ of Certiorari be GRANTED.

PRAYER

Petitioner prays this Court grant Petitioner's Petition for a Writ of Certiorari, reverse the order below dismissing Petitioner's direct appeal, and remand the case to the Fifth Circuit for review of the merits of Petitioner's appeal.

Respectfully submitted,

Adam L. Seidel
Counsel of Record
Adam L. Seidel, P.C.
Premier Place, Suite 900
5910 N. Central Expressway
Dallas, Texas 75206
Telephone: 214/528-3344
Facsimile: 214/528-3377

Kevin A. Voth
MILLS & WILLIAMS, LLP
5910 N. Central Expressway
Suite 900
Dallas, Texas 75206-5141
(214) 265-9265
(214) 363-3167 - facsimile

Counsel for Petitioner

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-11200

[Filed July 11, 2006]

UNITED STATES OF AMERICA Plaintiff - Appellee	))
v.	)
NIZAR MOMIN also known as, Nick Momin Defendant - Appellant	)))

Appeal from the United States District Court for the Northern District of Texas, Dallas

Before REAVLEY, JOLLY, and OWEN, Circuit Judges.

PER CURIAM :

IT IS ORDERED that Appellee's motion to dismiss the appeal is Granted.

IT IS FURTHER ORDERED that Appellee's alternative motion to extend time to filed Appellee's brief 21 days from the Court's denial of Appellee's motion to dismiss is moot.

/s/_____

APPENDIX B

UNITED STATES DISTRICT COURT
Northern District of Texas- Dallas Division

No.3:04-CR-289-H (03)
USM Number: 33776-177

[Filed October 13, 2005]
[Amended September 1, 2006]

UNITED STATES OF AMERICA	)
	)
v.	)
	)
NIZAR MOMIN	)
a/k/a "Nick Momin"	)
	)

AMENDED JUDGMENT IN A CRIMINAL CASE*

THE DEFENDANT:

[√] pleaded guilty to count(s) Count I of the Indictment filed on August 25, 2004

The defendant is adjudicated guilty of these offenses:

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* Amended Judgment per clerical error. Per the U.S. Marshal's Office, the correct USM Number is 33776-177.

Title & Section
18 USC § 371
(18USC § 1344(2))

Nature of Offense
Conspiracy to Commit Offenses Against the United States

Offense Ended
May 2000

Count
1

The defendant is sentenced as provided in pages 2 through6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[√] Counts 2 and 11, of the Indictment filed on August 25, 2004, [√] are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

October 13, 2005
Date of Imposition of Judgment

/s/
BAREFOOT SANDERS
SENIOR UNITED STATES DISTRICT JUDGE
September 1, 2006

IMPRISONMENT

Pursuant to the Sentencing Reform Act of 1984, but taking the Guidelines as advisory pursuant to United States v. Booker, and considering the factors set forth in 18 U.S.C. Section 3553(a), the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: **FIFTEEN (15) Months**.

[√] The court makes the following recommendations to the Bureau of Prisons:

The defendant requests incarceration at a Bureau of Prisons facility located in the Sugar Land, Texas area, to be near his family; the Court so recommends.

[√] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

[√] before 2:00 on November 17, 2005

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: TWO (2) years.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

[√] The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

[√] The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

[√] The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

Pursuant to the Mandatory Victim Restitution Act of 1996, the defendant shall pay restitution jointly and severally with co-defendants James Demik (01), Aamir Sattani (02), and Zulfiquar Dharani (04), as well as Sajid Hussain, in Case No. 3:04-CR-050-M (01), in the amount of $2,928,874.00, payable to the U.S. District Clerk for disbursement to:

Washington Mutual Bank
Attn: Bill Morrison
Care of: Haynes and Boone
Account Name: Speedy Stop loans

If upon commencement of the term of supervised release any part of the restitution remains unpaid, the defendant shall make payments on such unpaid balance beginning 60 days after release from custody at the rate of at least $200.00 per month, until restitution is paid in full. Further, it is ordered that interest on the unpaid balance is waived pursuant to 18 USC § 3612(f)(3).

The defendant shall provide to the U.S. Probation Officer any requested financial information.

The defendant shall cooperate in the collection of DNA within the first 180 days of supervision, as directed by the U.S. Probation Officer.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 100.00	$	$ 2,928,874.00

[√] The defendant must make restitution (including community restitution), payable to the U.S. District Clerk to be disbursed to the following payee(s) in the amount(s) listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee
Washington Mutual Bank
Attn: Bill Morrison
Care of : Haynes and Boone
Account Name: Speedy Stop loans

Restitution Ordered
$2,928,874.00

Priority or Percentage
N/A

TOTALS $ 2,928,874.00

[√] The court determined that the defendant does not have the ability to pay interest and it is ordered that:

[√] the interest requirement is waived for the [√] restitution.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

B [√] Payment to begin immediately (may be combined with [√] D); or

D [√] Payment in equal monthly (e.g., weekly, monthly, quarterly) installments of $200.00 over a period of XXXXXXX (e.g., months or years), to commence 60 (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

F [√] Special instructions regarding the payment of criminal monetary penalties:
It is ordered that the defendant shall pay to the United States a special assessment of $100.00, which shall be due immediately. Said special assessment shall be made to the Clerk, U.S. District Court.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the U.S. District Clerk, 1100 Commerce Street, 14th Floor, Dallas, Texas 75242.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

[√] Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

James Demik - 3:04-CR-289-H (01) - $2,928,874.00;
Aamir Sattani- 3:04-CR-289-H (02) - $2,928,874.00;
Zulfiquar Dharani - 3:04-CR-289-H (04) - $2,928,874.00;
Sajid Hussain - 3:04-CR-050-M (01) - $2,928,874.00

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community

restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

STATEMENT OF REASONS
(Not for Public Disclosure)

I COURT FINDINGS ON PRESENTENCE INVESTIGATION REPORT

A [√] The court adopts the presentence investigation and addendum report without change.

II COURT FINDING ON MANDATORY MINIMUM SENTENCE (Check all that apply.)

A [√] No count of conviction carries a mandatory minimum sentence.

III COURT DETERMINATION OF ADVISORY GUIDELINE RANGE (BEFORE DEPARTURES)

Total Offense Level: 18
Criminal History Category: I
Imprisonment Range: 27 to 33 months
Supervised Release Range: 2 to 3 years
Fine Range: $ 6,000.00 to $60,000

[√] Fine waived or below the guideline range because of inability to pay.

IV ADVISORY GUIDELINE SENTENCING DETERMINATION (Check only one.)

C [√] The court departs from the advisory guideline range for reasons authorized by the sentencing guidelines manual. (Also complete Section V.)

V DEPARTURES AUTHORIZED BY THE ADVISORY SENTENCING GUIDELINES (if applicable)

A The sentence imposed departs (Check only one.):

[√] below the advisory guideline range; or

B Departure based on (Check all that apply.):

1 Plea Agreement (Check all that apply and check reason(s) below.):

[√] 5K1.1 plea agreement based on the defendant's substantial assistance;

Explain the facts justifying the departure. (Use page 4.)

VII COURT DETERMINATIONS OF RESTITUTION

B Total Amount of Restitution: $2,928,874.00

VIII ADDITIONAL FACTS JUSTIFYING THE SENTENCE IN THIS CASE (if applicable).

The Court adopts as the fact findings of the Court, all facts set forth in the Presentence Report as modified or supplemented by any facts set forth in any Addendum and any facts found by the Court during the sentencing hearing; and, the Court adopts as the conclusions of the Court all conclusions expressed in the Presentence Report as modified or supplemented by any conclusions expressed in any Addendum and any conclusions expressed by the Court during the sentencing hearing. The Court recognizes the conclusions expressed in the Presentence Report and the Addendum to the Report, including the sentencing guidelines, are advisory only. In determining a sentence, the Court considered the

advisory guidelines pursuant to U.S. v. Booker, 2005 125 S.Ct. 738 (2005), as well as statutory concerns listed in 18 USC Section 3553(a).

Sections I, II, III, IV, and VII of the Statement of Reasons form must be completed in all felony cases.

Defendant's Soc. Sec. No.: xxx-xx-xxxx
Defendant's Date of Birth: January 4, 1969
Defendant's Residence Address : 4144 Greystone Way, Apartment 106, Sugar Land, Texas 77479
Defendant's US Marshal Number: 33776-177

October 13, 2005
Date of Imposition of Judgment
/s/
Signature of Judge
BAREFOOT SANDERS
SENIOR UNITED STATES DISTRICT JUDGE
Name and Title of Judge

September 1, 2006
Date Signed